

“3. Whether the Court erred in finding claimant provided just cause for failing to provide notice within 10 days.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, for preliminary hearing purposes the Appeals Board finds as follows:

(1) In its application for review, respondent raised an issue concerning whether claimant suffered personal injury by accident arising out of and in the course of his employment. However, it appears from the appeal brief of respondent that it has abandoned this issue. The brief only argues the issue of notice. Furthermore, in its brief respondent specifically states:

A logical interpretation of the evidence establishes that claimant suffered a specific accident on September 9, 1997 of which he was well aware. The Administrative Law Judge correctly determined that the accident was sustained.

Accordingly, the Appeals Board affirms the findings by the Administrative Law Judge that claimant suffered an accidental injury on September 9, 1997, and that the injury arose out of and in the course of his employment with respondent.

(2) The Administrative Law Judge found that respondent's general foreman, Kenneth M. Schaffer, was aware on September 9, 1997, that claimant had been walking in the mud shagging iron that day and that claimant's knees were hurting. From this, the Administrative Law Judge concluded that respondent had actual knowledge of the injury. Respondent disputes this finding because Mr. Schaffer testified that he did not have any recollection of claimant having any problems at work on September 9, 1997, and specifically testified that claimant did not report suffering a new injury to his left knee on September 9, 1997. It is significant that claimant had previously suffered accidental injury to his left knee at work on June 30, 1997, which was reported and medical treatment was provided. By September 9, 1997, claimant's symptoms from that prior knee injury had not fully resolved. Under these circumstances, knowledge by his foreman that claimant was having knee problems on or about September 9, 1997, would not constitute actual knowledge by respondent of a new accidental injury.

(3) It is not disputed that claimant reported his accident within 75 days of September 9, 1997. The Administrative Law Judge found that claimant had just cause for not specifically reporting his new accident within ten days because claimant did not realize he had sustained a new, separate, and distinct injury until Dr. Sergio Delgado informed claimant on October 29, 1997, after a MRI, that he had probably suffered a new injury. Until then claimant reasonably believed that his increased pain was probably a continuation of his earlier knee injury. Respondent disputes this finding primarily because claimant was

able to report to Dr. Delgado on October 29, 1997, that he recalled a specific incident whereby claimant had twisted his knee while walking in the mud. Therefore, respondent contends, that since claimant was aware he had suffered a specific accident on September 9, 1997, he had an affirmative duty to report the accident within ten days. See K.S.A. 44-520.

The Appeals Board finds that it was Dr. Delgado on October 29, 1997, who first suggested to claimant that he had suffered a new injury. Until that time claimant reasonably believed that his symptoms were the ongoing result of his original June 30, 1997, accident. When Dr. Delgado suggested that a new injury had occurred, claimant indicated that the only thing he could think of was the day he was walking in the mud shagging iron when his foot got stuck in the mud and he twisted his knee. Based upon this evidence, the Appeals Board finds just cause existed for claimant's failure to give notice within ten days.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing order dated December 23, 1997, entered by Administrative Law Judge Floyd V. Palmer should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

c: Mitchell D. Wulfekoetter, Topeka, KS
Ronald J. Laskowski, Topeka, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director